

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE MINNESOTA COMMISSIONER OF HEALTH

In the Matter of Uncle Nick's Market,  
WIC Vendor No. 7671

**RECOMMENDATION ON MOTION FOR  
SUMMARY DISPOSITION**

By written motion filed with the Office of Administrative Hearings (OAH) on April 21, 1998, the Department of Health has moved for summary disposition in the above-entitled matter. The Judge extended the reply period at the request of Mr. Mohd Mansour, Owner of Uncle Nick's Market. The record closed on May 8, 1998, with the receipt of the reply of Uncle Nick's Market.

Wendy Willson Legge, Assistant Attorney General, 525 Park Street, Suite 500, St. Paul, Minnesota, 55103-2106 represented the Minnesota Department of Health.

Mohd Mansour, Owner, Uncle Nick's Market, 3800 Fourth Street South, Minneapolis, Minnesota 55409, filed the response on behalf of the business.

Based upon the all of the filings in this case, and for reasons set out in the Memorandum which follows:

**IT IS HEREBY RECOMMENDED:**

1. That the Department's motion for summary disposition be GRANTED.
2. That the decision by the Minnesota Department of Health to disqualify Uncle Nick's Market from participation in the WIC program for a period of six months be AFFIRMED.
3. That the denial of the application of Uncle Nick's Market for participation in the WIC program be AFFIRMED.

Dated this \_\_\_\_ day of May, 1998.

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PHYLLIS A. REHA  
Administrative Law Judge

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**NOTICE**

This Report is a recommendation, not a final decision. The Commissioner of Health will make the final decision after a review of the record that may adopt, reject, or modify the Recommendations contained herein. Pursuant to Minn. Stat. § 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact, Pati Maier, Assistant Director, Division of Family Health, Department of Health, 717 Delaware Street, Minneapolis, Minnesota 55440, telephone (612) 623-5747, to ascertain the procedure for filing exceptions or presenting argument.

### **MEMORANDUM**

The Women Infant Children program (WIC program) is a federal program intended to supply nutritious food to pregnant and nursing women and to infants, when they otherwise could not afford to purchase that food. Vouchers for specific food items are issued to recipients of benefits. These vouchers are redeemed in authorized vendor's stores, where the vouchers are used in the same manner as cash, with the vendor writing in the cost of the listed items purchased and accepting the voucher as full payment for the listed items. The vendor then redeems the voucher for the amount written on the voucher. Only authorized vendors may submit vouchers to the WIC program for payment.

Anyone seeking to become an authorized vendor must apply to the Department. Applicants who are approved for participation enter into a Retail Food Vendor Guarantee that contains the provisions governing participation in the WIC program. Uncle Nick's entered into a Retail Food Vendor Guarantee with the Department on October 2, 1997. Chiat Affidavit, Exhibit A. By the terms of the Guarantee, Uncle Nick's was authorized to redeem WIC vouchers until April 30, 1998. *Id.* Exhibit A, p. 5, § X. The Guarantee is nonrenewable. *Id.* To continue as an authorized vendor in the WIC program after that time, Uncle Nick's is obligated to reapply.

On October 14, 1997, Uncle Nick's was assessed a civil penalty in the amount of \$1,680 by the U.S. Department of Agriculture for violation of the terms of participation in the Food Stamp Program. Stavig Affidavit. The civil penalty was in lieu of a six-month disqualification from that program. *Id.* Exhibit A. Uncle Nick's did not appeal the penalty within the allowable time period. Stavig Affidavit.

On December 29, 1997, Uncle Nick's reapplied for WIC vendor authorization from the Department. On February 19, 1998, the Department informed Uncle Nick's that its application for authorization was denied. Chiat Affidavit, Exhibit E. The Department indicated that the civil penalty imposed under the Food Stamp Program rendered Uncle Nick's ineligible for authorization by operation of Minn. Rules 4617.0065, subp. 5(A)(2) and 4617.0067, subp. 6. *Id.*

On March 30, 1998, the Department disqualified Uncle Nick's from continued participation in the WIC program under its existing guarantee. Chiat Affidavit, Exhibit G.

The disqualification letter noted that Minn. Rule 4617.0067, subp. 6(B), requires the denial of any WIC application submitted during the period of disqualification. *Id.* This matter is an appeal by Uncle Nick's challenging both its disqualification from the WIC program and denial of its application by the Minnesota Department of Health ("Department"). The Department responded by moving for summary disposition, asserting that no genuine issues of material fact exist for hearing in this matter.

#### Summary Disposition Standard

Summary disposition is the administrative equivalent of summary judgment. Summary disposition is appropriate where there is no genuine issue as to any material fact and one party is entitled to judgment as a matter of law. **Sauter v. Sauter**, 70 N.W.2d 351, 353 (Minn. 1955); Minn. Rule pt. 1400.5500K; Minn.R.Civ.P. 56.03. The Office of Administrative Hearings has generally followed the summary judgment standards developed in judicial courts in considering motions for summary disposition regarding contested case matters. See, Minn. Rules, pt. 1400.6600. A genuine issue is one that is not sham or frivolous. A material fact is a fact whose resolution will affect the result or outcome of the case. **Illinois Farmers Insurance Co. v. Tapemark Co.**, 273 N.W.2d 630, 634 (Minn. 1978); **Highland Chateau v. Minnesota Department of Public Welfare**, 356 N.W.2d 804, 808 (Minn. App. 1984).

The moving party, in this case the Department, has the initial burden of showing the absence of a genuine issue concerning any material fact. To successfully resist a motion for summary judgment, the non-moving party must show that there are specific facts in dispute which have a bearing on the outcome of the case. **Thiele v. Stitch**, 425 N.W.2d 580, 583 (Minn. 1988); **Hunt v. IBM Mid America Employees Federal**, 384 N.W.2d 853, 855 (Minn. 1986). The existence of a genuine issue of material fact must be established by the nonmoving party by substantial evidence; general averments are not enough to meet the nonmoving party's burden under Minn. R. Civ. P. 56.05. *Id.*; **Murphy v. Country House, Inc.**, 307 Minn. 344, 351-52, 240 N.W.2d 507, 512 (Minn. 1976); **Carlisle v. City of Minneapolis**, 437 N.W.2d 712, 75 (Minn. App. 1988). The evidence presented to defeat a summary judgment motion, however, need not be in a form that would be admissible at trial. **Carlisle**, 437 N.W.2d at 715 (citing, **Celotex Corp. v. Catrett**, 477 U.S. 317, 324 (1986)).

When considering a motion for summary judgment, the Court must view the facts in the light most favorable to the non-moving party. **Ostendorf v. Kenyon**, 347 N.W.2d 834 (Minn. App. 1984). All doubts and factual inferences must be resolved against the moving party. See, e.g., **Celotex**, 477 U.S. at 325; **Thiele**, 425 N.W.2d 580, 583; **Greaton v. Enich**, 185 N.W.2d 876, 878 (Minn. 1971); **Thompson v. Campbell**, 845 F. Supp. 665, 672 (D. Minn. 1994). If reasonable minds could differ as to the import of the evidence, judgment as a matter of law should not be granted. **Anderson v. Liberty Lobby, Inc.**, 477 U.S. 242, 250-51 (1986).

The Department argues that summary disposition is appropriate in this case because the material facts are not in dispute and the rule requirements are clear. The rules relied upon are part of the eligibility standards for vendor applicants.

Minn. Rule 4617.0065, subp. 5(A)((2) states:

Subp. 5. Application review and approval process. The commissioner shall, in accordance with this subpart, review vendor applications which have not been disapproved under subpart 3.

A. The commissioner shall perform an initial office review of each application to determine whether the application is complete and the applicant meets all applicable eligibility requirements in part 4617.0067.

\* \* \*

(2) If the commissioner determines during the initial office review of the application that the applicant does not meet an applicable eligibility requirement in part 4617.0067, subpart 4, item B, C, or F; or 6, the commissioner shall disapprove the application.

The eligibility requirement that the Department cites to support its denial of Uncle Nick's application is Minn. Rule 4617.0067, subp. 6(B)(1). That rule states:

**Subp. 6. Special requirements for vendor applicants.**

\* \* \*

B. An applicant must not currently be disqualified from any food assistance program. If a vendor applicant is subjected to a civil money penalty by a food assistance program, and:

(1) the notice of the civil money penalty specifies that the penalty is in lieu of disqualification for a specific period of time, then the vendor applicant is not eligible to become a vendor if there is any overlap between that period of time and the period of time between the relevant application deadline under part 4617.0065, subpart 3, and the commissioner's execution of a vendor agreement with the vendor applicant; or

(2) the notice of the civil money penalty does not specify that the penalty is in lieu of disqualification for a specific period of time, then the vendor applicant is not eligible to become a vendor if the relevant vendor application deadline under part 4617.0065, subpart 3, is less than six months after the date of the notice of the civil money penalty.

The rules are clear and the facts undisputed. The only issue that arises in this proceeding is the effect of the repeal of Minn. Rule 4617.0085, subp. 2(E). That rule provided that:

A vendor subjected to a civil money penalty instead of disqualification from another food and nutrition service program within the last six months is disqualified for six months for the offense that prompted the penalty and twelve months for each subsequent offense.

Minn. Rule 4617.0085 was repealed on August 18, 1997. See, 22 **State Register** 266 (Minn. August 11, 1997). At the same time, Minn. Rule 4617.0086 took effect. *Id.* Subpart 7B of that rule part states:

Subp. 7. Additional grounds for disqualification. In addition to the grounds for disqualification specified in subpart 1, a vendor shall be disqualified from the WIC program according to this subpart, but the period of disqualification shall not exceed the maximum period authorized in Code of Federal Regulations, title 7, section 246.12 (k)(1)(ii), as amended.

\* \* \*

B. If a vendor is assessed a civil money penalty in lieu of disqualification from any other food assistance program, and the penalty is in lieu of disqualification for a specified period of time, and disqualification of the vendor will not create undue hardships for WIC participants, then the commissioner shall disqualify the vendor from the Minnesota WIC program for the amount of time specified in the notice of assessment of the civil money penalty.

Minn. Rule 4617.0086 , subp. 7B.

The Department asserts that the repeal of Minn. Rule 4617.0085 does not affect this matter, since Minn. Rule 4617.0120, subp. 6 states:

Subp. 6. Disqualification provisions. The commissioner shall enforce the disqualification provisions in each fully executed vendor agreement or vendor guarantee, notwithstanding anything in part 4617.0086.

The vendor guarantee entered into by Uncle Nick's provides for termination if the vendor is disqualified. Chiat Affidavit, Exhibit A, p. 5, § X. E. The disqualification standards contained in the guarantee include the vendor having a civil penalty imposed in lieu of disqualification from the Food Stamp program. *Id.* p. 7, § XI. E. The vendor guarantee supports the disqualification imposed by the Department.

Minn. Rule 4617.0086 is the provision for classes of violations under the newly adopted WIC program rules. Under the newly adopted rule, Uncle Nick's would be subject to disqualification for six months due to the imposition of a civil penalty in lieu of a six-month disqualification from the Food Stamp program. Minn. Rule 4617.0086, subp. 7B. The standard for denying applications from persons disqualified under other programs remained unchanged throughout the time at issue in this matter.

Uncle Nick's asserts that disqualification from and denial of its application for participation in the WIC program is unjust. Mr. Mansour related the circumstances of the improper sale that lead to the civil penalty. He indicates that a clerk violated explicit instructions to sell only approved foods when food stamps are used. Mr. Mansour maintains that disqualification will have a very serious impact on Uncle Nick's through the loss of business that would result.

The circumstances described by Mr. Mansour are not uncommon in WIC disqualification actions and can appear unfair to the small business owner. But there is a system used by the Department to oversee the WIC program. This system, contrary

to Mr. Mansour's assertion, is not analogous to the Parable of the Cave from Plato's **Republic**. The distribution of vouchers by the Department of Health is the equivalent to distributing public money. Reasonable measures need to be taken to ensure that the purposes of the program are achieved and the funds are not diverted from allowable uses. The similarity between the Food Stamp program and the WIC program supports using the enforcement mechanisms of the Food Stamp program for policing the WIC program and ensuring that vendors adhere to the WIC program standards.

In this matter, the misconduct of a clerk working in Uncle Nick's Market has lead to the imposition of a \$1,680.00 civil penalty and disqualification of the store from participation in the WIC program. Uncle Nick's bears the burden of demonstrating that it meets all the requirements for participation as a vendor in the WIC program. See, ***In re City of White Bear Lake***, 247 N.W.2d 901, 904 (1976) (burden of proof to show that a license should be granted is on applicant). Due to the rules governing the WIC program, Uncle Nick's Market cannot, as a matter of law, make that demonstration. There being no issues of material fact, summary disposition for the Department is appropriate.

P.A.R.